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No. 78-1112

In the Supreme Court of the United States

OCTOBER TERM, 1978

GLORIA A. BROTHERS AND EDGAR C. NEWALL, PETITIONERS

v.

ARTHUR SCHIMKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the district court erroneously granted summary judgment in favor of respondents, employees of the United States Forest Service who were alleged to have posted "no trespassing" signs on two cabins located on a mining claim that the Department of the Interior had determined to be invalid. Petitioners alleged that they had filed a mining claim with boundaries coextensive with those of the invalidated claim one day after a meeting with federal officials at which the invalid claim's owner, a friend of petitioners, had received the last of several warnings that if she did not remove the cabins they would become the property of the United States.

As both the petition (Pet. 13-14) and the court of appeals (Pet. App. A-4) state, this case presents almost the same fact situation as *Walker* v. *Hoffman*, 583 F. 2d 1073 (9th Cir.), cert. denied, No. 78-724 (Jan. 22, 1979).

The difference is that in *Walker* the Forest Service officials actually destroyed the cabin and confiscated abandoned personal property, while in this case they only posted "no trespassing" signs.

Here, after the Interior Department had invalidated a mining claim on national forest land, formerly owned by a Mrs. Wagner, Forest Service employees notified her that, if she failed to remove two cabins from her former claim by a specified deadline, the cabins would become property of the United States. The final notification was given at a meeting of Forest Service employees with Mrs. Wagner and petitioner Brothers (Pet. 6). The next day, two days before the deadline, petitioners filed a new mining claim coinciding with the boundaries of the earlier claim (Pet. App. A-7). On the deadline date, a Forest Service employee posted notices declaring the cabins federal property (*ibid.*).

Petitioners' suit against the Forest Service employees was based on an alleged conspiracy to deprive petitioners of their property. Respondents moved for summary judgment on the basis of affidavits attesting to the reasonableness of their conduct, the named respondent who posted the signs stating that he did so in a good faith belief that the claim was invalid (Pet. App. A-7 to A-8). Respondents' summary judgment motion was granted by the district court and the order was affirmed by the Ninth Circuit, on the basis of the immunity accorded federal employees performing their official duties reasonably and in good faith. (Pet. App. A-4.) The court of appeals also held that "buildings abandoned by a former claimant whose claim was invalidated become the property of the United States" (Pet. App. A-3) and that petitioners, beyond filing a new mining claim, had failed to state any facts establishing their possessory interest in the abandoned cabins.

Petitioners contend (Pet. 16) that they should have been allowed to prove their allegations of bad faith. They do not contend, however, that they invoked, much less that the district court improperly denied, the procedure of Fed. R. Civ. P. 56(f), which permits a court to postpone ruling on a summary judgment motion in order to allow discovery. Absent any such claim, Rule 56 makes it clear that a summary judgment motion may not be denied merely because the party opposing it hopes to develop evidentiary leads at trial or later proceedings. Rather, Rule 56 requires the district court to determine whether there are genuine issues of material fact on the basis of the record before the court. Here, the district court and the court of appeals properly held that the summary judgment record presented no genuine issue of material fact concerning respondents' immunity.

The rulings are in accord with the suggestion of this Court in *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 28, that "damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity." As this Court also observed (slip op. 28-29), "[i]n responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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